No. 241

Supreme Court of the United States

OCTOBER TERM 1944

ALLISON BISHOPRIC, MARK TWAIN OIL CO., W. B. SHAFFER, and NATIONAL SURETY CORPORATION,

Petitioners,

vs.

CITY OF JACKSON, MISSISSIPPI, and MISSISSIPPI POWER & LIGHT COMPANY,

Respondents.

PETITION FOR CERTIORARI AND BRIEF OF PETITIONERS

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Respondents.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Allison Bishopric, Mark Twain Oil Company, and W. B. Shaffer, appellants below, and National Surety Corporation, their surety on appeal, petition for review, upon writ of certiorari, of the decision and final judgment of the Supreme Court of Mississippi, being the court of last resort of that state, and respectfully show:

SUMMARY STATEMENT OF MATTER INVOLVED

This suit involved a determination of the rights of the principal petitioners in the proceeds of three producing gas wells drilled by the City of Jackson. Said petitioners entered into a formal contract with the City of Jackson

wherein they agreed to advance an equal amount of capital with said municipality which the latter used in drilling four gas wells, three of which were commercial producers. The municipality was expressly authorized by Chapter 280, Mississippi Laws 1940 (appendix) to purchase or drill such wells, as it did, without the use of money derived from taxation. Under the agreement between the parties, the principal petitioners and the municipality were to share equally in the fruits of the venture. (R. 23). The municipality executed what was intended by the parties as a conveyance to said petitioners of the agreed interest in the leases involved in exchange for such outlay by said petitioners of said capital and their geophysical services in locating the drilling sites. (R. 27, 45). The local gas field in which said wells were drilled was depleted at the time to the extent that reputable geologists regarded the chances of success of the venture as one out of a hundred. The principal petitioners contributed approximately $20,000.00 to the venture. (R. 182).

The municipality repudiated its contract with and conveyances to the petitioners and sold the entire gas output from these three wells to the other respondent herein without seeking the best price therefor. Yet in the first year of production, $55,567.98 was realized therefrom. (R. 182).

The municipality was in a gas rate controversy with the Mississippi Power & Light Company then serving its inhabitants and its purpose in drilling these wells was to provide additional gas for local needs. After complete performance of the contract between the principal petitioners and the City of Jackson, and when the venture was found successful, the municipality settled its rate controversy with the Mississippi Power & Light Company and entered into a contract with said utility for the sale of the entire gas output from these wells to said utility at a nominal price

without seeking the best market price therefor. (R. 30). This action precipitated a suit filed by the municipality in the State Court to construe the contract and define the rights and interests of the parties therein; (R. 1-32) and in the alternative, to have said contract declared ultra vires the power of said municipality and void. (R. 36). The trial court decreed that said fully performed contract was void, and thereupon cancelled the conveyances of petitioners' interest in said leases and awarded petitioners only a return of their money with six percent interest thereon. (R. 191).

The petitioners appealed to the Supreme Court of Mississippi where the decision of the trial court was affirmed by the entire court on a ground first raised in the briefs of counsel on appeal, namely, that Chapter 280, Mississippi Laws 1940, authorizing the municipality to engage in such venture, violated Sections 87 and 88, Mississippi Constitution 1890. See *Bishopric, et al.*, v. *City of Jackson, et al.*, 15 So. (2d) 436. (R. 196) (Appendix, 23).

The petitioners then filed a suggestion of error contending that the Federal Constitution was violated in the respects indicated by the points hereinafter stated. (R. 200). The Mississippi Supreme Court withdrew its former opinion and expressly held that Chapter 280, Mississippi Laws 1940, was constitutional. The same justice who had written the former opinion, wrote a second opinion upon the suggestion of error but this time held that petitioners' contract was ultra vires and void because it violated Section 183, Mississippi Constitution 1890, with two justices concurring. See *Bishopric, et al.* v. *City of Jackson, et al.*, 16 So. (2d) 776. (R. 202) (Appendix, 27).

It is noteworthy in the connection that no constitutional objection was assigned or argued by respondents in the trial court, and that it was not contended by counsel in the

appellate court that Section 183, Mississippi Constitution 1890, was in any manner violated by the contract. The other three justices of the Mississippi Supreme Court vigorously dissented, resulting in the decree of the trial court being affirmed because of an equally divided court with the affirming opinion based upon an entirely new ground. (R. 208-214) (Appendix, 35-42).

The record in the case is without dispute that the municipality did not lend any credit to petitioners, but on the contrary, the petitioners paid the municipality their money which was used by it in this venture so as to lessen its hazard of loss therein. It is petitioners' view that under such circumstances they have been most unjustly dealt with and deprived of their property in this case by an arbitrary course of judicial decision which finds no factual justification or support in this record.

QUESTIONS PRESENTED

The ultimate questions thus presented are: Whether the action of the municipality and decision of the court cancelling the ordinance contract and conveyances executed pursuant thereto deprive the principal petitioners of their property without due process of law or deny them the equal protection of the laws, in violation of Article 14, Section 1, of the Amendments to the Constitution of the United States.

BASIS OF JURISDICTION

A review of this final judgment of the highest State Court in Mississippi is plainly within the jurisdiction of this court, under 28 U. S. C. A., Section 344 (b), authorizing such review: "Where any title, right, privilege or immunity is set

up or claimed by either party under the constitution * * * of * * * the United States; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied," etc. The final decision of the Mississippi Supreme Court in this case was rendered on February 14, 1944, as reported in 16 So. (2) 776. Time to file the record and petition in this case was extended by this court during the ninety day period allowed therefor to June 12, 1944, and subsequently to July 10, 1944. The Mississippi Supreme Court first affirmed the judgment of the trial court by an opinion reported in 15 So. (2d) 436. The principal petitioners filed a suggestion of error therein setting up that they were deprived of their property in violation of Section 1, Article 14, of the Amendments of the Constitution of the United States. (R. 200). In response to such suggestion of error, which was overruled by an equally divided court, the opinion reported in 15 So. (2d) 436 was expressly withdrawn and a new and entirely different opinion reported in 16 So. (2d) 776 was substituted therefor.

As Rule 14 (3) of the Mississippi Supreme Court provides: "After a suggestion of error has been sustained, or overruled, by the court, no further suggestion of error shall be filed by any party," the petitioners were therefore deprived of an opportunity to amplify the federal questions presented by the latest decision of the court. The latest announcement of the court was thus unanticipated. It held constitutional Chapter 280, Mississippi Laws 1940, which the municipality procured to be passed by the Legislature to authorize it to acquire and drill these gas wells, which Act the court in its previous opinion held unconstitutional as its sole basis for affirming the judgment of the lower court and cancelling the conveyances to Petitioners.

No constitutional question was presented or argued in the trial court. It was on appeal that respondents first urged that Chapter 280, Mississippi Laws 1940, violated Sections 87 and 88, Mississippi Constitution 1890. It was never contended or argued by respondents that Section 183, Mississippi Constitution, 1890, was violated. A reference to that section in the appendix and a casual perusal of this record will reveal no factual support whatever for that view which was entertained only by the justice writing the affirming opinion. The other two justices wrote a separate concurring opinion. (R. 207). Under the circumstances, an examination of the original opinion of the court attached (R. 196) and the opinions of the court on suggestion of error attached (R. 202-214) clearly demonstrates that these vested rights of the petitioners under the Federal Constitution were violated. The unsubstantial non-federal ground of the state decision cannot deprive this court of its inherent power to review such decision and prevent an abuse of such vested right of the petitioners.

REASONS FOR ALLOWANCE OF WRIT

The Supreme Court of Mississippi has decided a Federal question of substance in a way that is not in accord with the applicable decisions of this court. A vested property right was asserted and in effect denied by the State Court.

In exchange for $18,637.13 in cash (R. 182) paid the municipality and geophysical services rendered by Petitioners of the agreed value of $1,800.00 (R. 182) in locating the sites of the four wells drilled, the municipality executed a contract (R. 23) and an assignment of a half

interest in certain leases (R. 27) and an assignment of a 1/20th override royalty interest therein (R. 45). With this contribution from the principal petitioners, the municipality proceeded to drill these four wells in a gas field thought by experts to be depleted and when the chances of success were considered one out of one hundred. After the hazardous venture proved successful, the municipality then decided, after the contract had been fully performed, to go no further with the venture. (R. 187) and to repudiate its contract with petitioners.

The city used no tax money for the venture but got its funds from an unencumbered surplus of its water department which is a proprietary function. (R. 92). The municipality then refused to abide by its contract with principal petitioners and made a contract with the other respondent herein to sell all gas to it from these wells. (R. 30). The municipality thus disposed of all gas from these wells, including petitioners' interest therein, in connection with its settlement of a gas rate controversy then existing between said municipality and the utility serving it, both respondents herein. (R. 30).

The municipality first filed its complaint in the trial court (R. 1-34) to have the parties' interest in said venture fixed and defined by the court. By amendment to its complaint, it sought a decree holding the contract in question ultra vires and void (R. 34) but never sought a cancellation of the assignments of interest in said leases previously mentioned. (R. 36). The trial court decreed the contract void and cancelled the contract and assignments of interest in said leases to petitioners. (R. 191). Chapter 280, Mississippi Laws 1940, expressly authorized the City of Jackson to acquire these wells without providing how it

should do so. (Appendix 21). Under Sec. 2391, Mississippi Code 1930, (Appendix 22), the municipality was authorized to sell petitioners an interest in this venture, irrespective of the power of such municipality to drill gas wells. No credit was lent by the municipality to petitioners as the controlling opinion of the State Court states. (R. 208). Under all of the authorities, this fully performed contract and the rights thereby vested in petitioners cannot be destroyed and appropriated by the municipality without doing violence to the Fourteenth Amendment of the Federal Constitution. The reason assigned by the state court for its decision is without factual support in this record and is therefore so unsubstantial as to be an arbitrary act, depriving these petitioners of their property without due process and in violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution. The court's announcement was thus wholly unanticipated by petitioners and they were afforded no chance to amplify such federal question in the State Court. Under the rule of said court, no re-hearing or second suggestion of error was allowed petitioners. This decision on the suggestion of error was rendered by an equally divided court — the justices rendering the affirming opinion not being in agreement among themselves thereon, and thereby the judgment of the trial court became final although it was based on an entirely different reason not involving the State Constitution at all. (R. 191).

WHEREFORE, petitioners pray that a writ of certiorari issue to the Supreme Court of the State of Mississippi in this case according to law, and that on a re-hearing hereof, it may please the court to reverse and remand said cause for a just and equitable fixation of petitioners' interest in the property in suit according to their contractual

interest therein, and for such further relief as may seem meet and proper in the premises.

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W. B. SHAFFER,
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Petitioners,

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STATEMENT OF THE CASE

Strangely enough the facts in this case are without substantial dispute. The City of Jackson was engaged in a gas rate dispute with the Mississippi Power & Light Company in 1940 when the former procured the passage by the Mississippi Legislature of Chapter 280, Mississippi Laws 1940. The gas field in Jackson was thought by experts to be exhausted and the municipality desired to use its proprietary funds to disprove this theory and provide additional gas for its inhabitants. (R. 76). The chances for success of such venture were one out of a hundred. The principal petitioners advanced to the municipality in cash and scientific services approximately $20,000.00 for a working interest in this exploration conducted by the municipality. Three of the four wells drilled were brought in as commercial producers. The municipality ousted petitioners from the venture, appropriated their interest herein, and sold the entire gas output from the wells to Mississippi Power & Light Company, at a nominal price, in a settlement of their gas rate dispute. (R. 30). The wells were connected with the utility pipe lines in November, 1941, and from that time to December 25, 1942, yielded the municipality under said contract $55,567.98. (R. 182). After drilling these wells, the municipality changed its plan for producing sufficient wells to provide gas for its inhabitants. (R. 187). This litigation ensued with the result that petitioners' contract (R. 23) was cancelled (R. 191), and the assignments to petitioners of their interest in said venture (R. 27, 45) were cancelled by decree of the trial court, although the court was not requested by the pleadings to do so. (R. 36). The municipality is still receiving and continuing to enjoy the fruits from said venture. Thus, after the formal contract, duly executed in

every respect, was fully performed, the municipality was permitted by a court of equity to repudiate its solemn obligation to petitioners, and even cancel its previous conveyances of interest in the leases given for such valuable consideration. The trial court reasoned that the municipality was without power to make such a contract. (R. 191), irrespective of Chapter 280, Mississippi Laws 1940. The Mississippi Supreme Court affirmed the decision of the lower court solely on the ground that Chapter 280, Mississippi Laws 1940, violated Sections 87 and 88, Mississippi Constitution 1890. See opinion 15 So. (2d) 436. Petitioners filed a suggestion of error. (R. 200). This suggestion of error was overruled by an opinion by the same justice who wrote the original opinion expressly holding Chapter 280, Mississippi Laws 1940, constitutional, withdrawing the original opinion and holding that the contract and conveyances to petitioners were void because they violated Section 183, Mississippi Constitution 1890. See opinion 16 So. (2d) 776. Two justices separately concurred for a different reason (R. 207), resulting in the affirmance of the judgment of the lower court. Three justices filed able and vigorous dissents thereto. (R. 208-214). Under Rule 14 (3), Mississippi Supreme Court, cited at Page 5 of the petition, no further suggestion of error or right to amplify any federal right violated by the last decision was afforded petitioners. The petitioners are not affected by a determination of the question as to whether or not the municipality had a right to engage in such a venture even with its proprietary funds. The petitioners had bought from the municipality an interest in this property which it was not at liberty to appropriate for public use without reasonable compensation therefor. The municipality is admittedly authorized to sell any property it may rightfully or wrongfully acquire, as the state court

held in approving the sale of the gas to the Mississippi Power and Light Company. With no effort toward compensation when the venture is a success, and after braving all of the hazards of such a venture with this substantial capital contribution, it is not only inequitable but is unconscionable in the extreme to permit the municipality under such circumstances to repudiate its contract and have the entire fruits of this venture given it in exchange for petitioners said contribution thereto.

ASSIGNMENTS OF ERROR

The Mississippi Supreme Court erred in affirming the judgment of the lower court cancelling the contracts in suit on the ground that they were void as violating Section 183, Mississippi Constitution 1890 for the reasons:

(1) That Section 183, Mississippi Constitution 1890 was and is in nowise involved.

(2) The court erroneously cancelled said contracts in suit after full performance thereof and while the municipality then and now continues to enjoy the fruits thereof, without requiring it to do equity as a prerequisite thereto.

(3) That the decision of the court is predicated on a supposed fact not to be found in this record to the effect that the municipality thereby lent its credit to petitioners in violation of Section 183 of the Constitution, and its decision is arbitrary and thereby deprives these petitioners of their property without due process and in violation of the equal protection clause of the Federal Constitution.

ARGUMENT

The original record in this case consisted of some six hundred typewritten pages which were we able to reduce by agreement by approximately one-half. The facts in this case in the main are without substantial dispute. The City of Jackson induced the principal petitioners to share the hazards and one-half of the expense of drilling four gas wells within the city limits of the capitol city of Mississippi, in exchange for which the municipality contracted (R. 23) to give petitioners a fixed interest in this development. All statutory formalities in passing the ordinance contract were strictly observed. Assignments were executed by the municipality (R. 27, 45) pursuant to said contract which were intended to convey the agreed interest in the four wells drilled. A dispute between the parties over marketing the gas precipitated this litigation. The municipality appropriated the entire interest in the wells and presumed to sell the entire output therefrom on its own terms. (R. 30). This contract was expressly held valid while the contract and interest conveyed petitioners pursuant thereto in the same venture were held invalid.

The court will not be burdened with a restatement of the facts but this court cannot find in this record one scintilla of evidence to support the majority opinion of the State Court that the credit of the municipality was lent the petitioners in violation of Section 183, Mississippi Constitution. See the statement of Chief Justice Smith (R. 208) in dissenting opinion. It is anomalous to note in the connection that in *Albritton* v. *City of Winona*, 178 So. 799, appeal dismissed 303 U. S., 627, that the Mississippi Supreme Court held that an act which authorized the City of Winona to issue bonds in the amount of $35,000.00 for the construction of a building to house a hosiery mill which

the municipality should lease for not less than t venty-five years did not impinge upon Section 183, Mississippi Constitution. It was never contended or argued by counsel that this section of the Mississippi Constitution was violated. In the original decision of the Supreme Court in the present case, reported in 15 So. (2d) 436, (R. 196) appearing at page 23 annexed to the petition, the court affirmed the trial court for an entirely different reason. It was recognized by the court that Chapter 280, Laws 1940, was passed by the Mississippi Legislature for the avowed purpose of enabling the City of Jackson to acquire gas wells without limit as to plan, and without pledging the general credit of the municipality. The court recognized this barrier on the initial hearing and declared the act unconstitutional as a necessary prelude to condemning the contract with and conveyances to petitioners as being ultra vires. These circumstances are mentioned for the court's consideration of our contention that the ultimate decision of the court is arbitrary and without factual support in the record.

The petitioners throughout the trial in the lower and appellate courts asserted their vested property rights in the subject matter of the litigation. In their suggestion of error (R. 200), the petitioners called the court's attention to the federal question arising under the Fourteenth Amendment of the Federal Constitution by depriving them of their property in violation thereof. The court decided the case against such asserted right of the petitioners but without express mention thereof. Under Rule 14 (3) of the Mississippi Supreme Court, no further suggestion of error was allowed and no rehearing is provided for at which such violated federal right might have been amplified. The final decision of the Supreme Court was a complete about-face from its former position and such action was wholly

unanticipated by the petitioners on the questions presented and argued to the court.

After using approximately $20,000.00 of petitioners' money in a venture where there was one chance for success out of a hundred, after the venture had proven highly successful, and after a full performance of the contract, with the municipality then and now continuing to enjoy the fruits thereof, it was permitted by a court of equity to repudiate and have its solemn contract declared void. It should also be called to the court's attention that the action to cancel the contract with petitioners was brought by the city, and the plea of ultra vires employed as an offensive weapon, without any attempt or offer on the part of the city first to do equity. And although the doctrine of ultra vires was invoked, not to protect the municipality, but to confiscate petitioners' property, the court went even further on its own initiative without a prayer in the complaint therefor and cancelled said instruments. (R. 191). No authority was cited by the court in support of such unusual position. The lower court's judgment was affirmed by an equally divided Supreme Court. The opinion of the court decides nothing for the future in other cases under such circumstances but violates these petitioners' constitutional rights and deprives them of their property in this case. The decision of the court is likewise not based on a substantial non-federal ground and is not in accord with the decisions of this court under like circumstances.

Where the petitioners' asserted right raises a Federal question, this court will independently determine all questions on which the Federal right is necessarily dependent. *U. S. v. Pink*, 315 U. S., 203, (cert. to Supreme Court of N. Y.). In deciding the constitutional question presented, this court will determine for itself whether there is in fact a contract, and if so, the extent of its binding obligations,

but will lean to an agreement with the State Court if doubtful. *Georgia Railway and Power Co.* v. *Town of Decatur*, 262 U. S., 432.

Where the decision of the State Court is manifestly unsound and arbitrary, this court is not bound by its findings of fact or conclusions of law. The case at bar falls directly within such rule. In *Interstate Amusement Co.* v. *W. S. Albert*, 239 U. S., 560, it is said at page 566:

> "But the rule has its exceptions, as, for instance, where there is ground for the insistence that a Federal right has been denied as the result of a finding that is without support in the evidence. *Southern P. Co.* v. *Schuyler*, 227 U. S., 601, 611, 57 L. ed. 662, 669, 43 L. R. A. (N.S.) 901, 33 Sup. Ct. Rep. 277; *North Carolina R. Co.* v. *Zachary*, 232 U. S., 248, 259, 58 L. ed. 591, 595, 34 Sup. Ct. Rep., 305, Ann. Cas. 1914C, 159; *Carlson* v. *Washington*, 234 U. S., 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717."

Though the Federal rights claimed were not in terms stated to be within the protection of the Federal Constitution, it was doubtless so understood and treated by the Mississippi Supreme Court which, in effect, denied such rights by its decision.

> *Adelaide V. Tilt* v. *Kelsey*, 207 U. S., 43;
> *Carlson* v. *Washington*, 234 U. S., 103.

Indeed, whether a Federal question was adequately presented by the petitioners, or the case presents one or more exceptions to the general rules therefor, is itself a substantial Federal question for the determination of this court.

> *Ancient Egyptian Shrine* v. *Michaux*, 279 U. S., 737;

Great Northern Ry. v. *State of Washington*, 300 U. S., 154;
Lovell v. *City of Griffin*, 303 U. S., 444.

In *Demorest et al.* v. *City Bank Farmers Trust Co., et al.*, (not officially reported), 64 S. Ct., 384, at page 388, the court said:

> "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this court. *Broad River Power Co.* v. *South Carolina*, 281 U. S., 537, 540."

Even though asserted constitutional protection be denied the petitioners on non-federal grounds, the United States Supreme Court may inquire whether State Court's decision rests upon a substantial basis.

Lawrence v. *State Tax Commission*, (Miss.) 286 U. S., 276.

In *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S., 651, the first syllabus, supported by the text, says:

> "The jurisdiction of this court to review a judgment of a State Court is not affected by the circumstance that the right for which constitutional protection is claimed depends on the state law."

In *Ward* v. *Board of Commissioners of Love County, Oklahoma*, 253 U. S., 17, it was held that the jurisdiction of this court to review the judgment of a State Court, the effect of which is to deny a Federal right, cannot be voided by basing such judgment on non-federal grounds which are plainly untenable.

In *Southwestern Telephone and Telegraph Co.* v. *Danaher*, 238 U. S., 482, it was held that while this court will not revise the construction placed on a state statute by a State Court, it will determine whether the application of the statute so construed is so arbitrary as to amount to deprivation of property without due process of law. This rule would apply as well to the application of a state constitutional provision.

> See, *Attorney General of Michigan* v. *Lowrey*, 199 U. S., 233.

Many years ago, this court felt that a situation such as the present one might arise and dealt with it accordingly. For in the case of *Leath* v. *Thomas*, 207 U. S. 93 (1907), after stating that where a case comes to the U. S. Supreme Court from a state Court, only federal questions can be considered, which questions must be necessary to the decision of the case, Mr. Justice Holmes at page 99 said:

> "Of course, there might be cases where, although the decision put forward other reasons, it would be apparent that a Federal question was involved whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a State Court even if, ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction. *Johnson* v. *Risk*, 137 U. S., 300, 307."

The State Court cannot, by resting its judgment upon some supposed ground of local law, defeat the appellate

jurisdiction of this court if the asserted Federal right, recognized and enforced, would require a different judgment.

> *West Chicago Ry. Co.* v. *Chicago*, 201 U. S., 506; *Chicago, B. & Q. Ry. Co.* v. *Illinois*, 200 U. S., 561; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S., 468.

We ask the court to bear in mind in this case the decision of the State Supreme Court when petitioners' suggestion of error was filed. The last opinion of the court in response thereto possibly left petitioners' constitutional questions here presented in need of some amplification which they have not had an opportunity to provide. In its first opinion, the State Supreme Court overlooked a previous announcement in the case of *Feemster* v. *City of Tupelo*, 83 So. (Miss.) 804, which made its holding of the unconstitutionality of Chapter 280, Laws 1940, untenable without overruling that decision. It was unable to circumvent the authority given the City of Jackson by the 1940 Act to acquire gas wells in any manner it chose and could not affirm the decision on the initial hearing without declaring this act unconstitutional, as it did. When this anomalous situation was called to the court's attention on the suggestion of error, instead of sustaining the suggestion of error, it withdrew its entire opinion, declared Chapter 280, Laws 1940, constitutional and affirmed the judgment of the lower court on an entirely different ground not even presented to the court.

The City of Jackson continues to enjoy a large revenue from this venture which it has been permitted literally to convert to its own uses under judicial fiat without any effort toward compensation therefor. Though Mississippi has no declaratory judgment statute, the municipality first sought a definition of the respective rights of the parties to this contract by an original complaint, and then by a subsequent amendment thereto, sought to have the con-

tract declared void. It never contended that the assignments (R. 27, 45) were void and never asked that they be cancelled (R. 36) but the court did cancel them on its own initiative. (R. 191). The contract between the parties had been fully performed and while continuing to receive all of the benefits inuring from the venture, the municipality instituted this proceeding without any sort of offer to do equity and obtained all and more than it asked. Without burdening the court at this point with any authority to support such view, it is sufficient to note that neither of the controlling opinions of the State Court cites any authority for cancelling a contract at the instance of any political subdivision after it has been performed and while then enjoying the fruits thereof, because there is absolutely no authority or precedent therefor.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of the State of Mississippi is founded on an unsubstantial non-federal ground and that the decision of the court deprives these petitioners of their property in violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States, and that the peitioners are entitled to a review thereof by this court on certiorari.

Most respectfully submitted,

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APPENDIX

Chapter 280, Mississippi Laws 1940

"AN ACT authorizing municipalities to operate gas systems and authorizing the drilling of gas wells within a municipality, or wtthin a radius of five miles thereof.

"SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That municipalities of thirty-five thousand (35,000) inhabitants or over, according to the 1930 census, be and they are hereby authorized to operate gas systems, including gas distribution systems, and to that end said municipalities are authorized to drill or purchase a well, or wells, to supply said gas systems within the municipality, or within a radius of five (5) miles of said municipality, provided that the money used therefor is made available out of the gas system or some other public utility belonging to said municipality.

"Section 2. That all laws or parts of laws in conflict herewith be and the same are hereby repealed.

"Section 3. That this act be in force and take effect from and after its passage."

Section 183, Mississippi Constitution 1890

"No county, city, town, or other municipal corporation shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation, or loan its credit in aid of such corporation or association. All authority heretofore conferred for any of the purposes aforesaid by the legislature or by the char-

ter of any corporation, is hereby repealed. Nothing in this section contained shall affect the right of any such corporation, municipality, or county to make such subscription where the same has been authorized under laws existing at the time of the adoption of this Constitution, and by a vote of the people thereof, had prior to its adoption, and where the terms of submission and subscription have been or shall be complied with, or to prevent the issue of renewal bonds, or the use of such other means as are or may be prescribed by law for the payment or liquidation of such subscription, or of any existing indebtedness."

Section 2391, Mississippi Code 1930

"*Each a municipal corporation-powers* -. Each city, town, or village which is incorporated shall be governed by the provisions of this chapter, and shall be a municipal corporation, with power:

"*First.* - To sue and be sued.

"*Second.* - To purchase and hold real estate and personal property; to purchase and hold real estate, within the corporate limits, for all proper municipal purposes, and for parks, cemeteries, hospitals, schoolhouses, houses of correction, waterworks, electric lights, and sewers. And without the corporate limits may be owned under purchase, grant, or devise, heretofore or hereafter made, to be used for such purposes, and for pest houses.

"*Third.* - To sell and convey any real and personal estate owned by it, and make such order respecting the same as may be deemed conducive to the interest of the municipality, and to exercise jurisdiction over the same.

"*Fourth.* - To make all contracts and to do all other acts in relation to the property and concerns of the municipality

necessary to the exercise of its corporate or administrative powers.

"*Fifth.* - To exercise such other or further powers as are herein conferred."

MISSISSIPPI SUPREME COURT OPINION

(November 8, 1943.)

ANDERSON, J.

The parties to this cause are the appellants, the Mark Twain Oil Company, a partnership, composed of the appellant, Allison Bishopric, and others; and the appellees, the City of Jackson, the Mississippi Power & Light Company, and others whose names it is unnecessary to mention, for reasons which will appear later. The appellants will be referred to as the Mark Twain Company and the appellees as the City and the Power Company.

For some time prior to 1940 the Mississippi Power Company, under a franchise from the City, was furnishing its inhabitants with natural gas. There arose a controversy between them as to the rates that should be charged, which resulted in the City procuring the passage of Chapter 280, Laws 1940, which follows:

"Section 1. *Be it enacted by the Legislature of the State of Mississippi,* That municipalities of thirty-five thousand (35,000) inhabitants or over, according to the 1930 census, be and they are hereby authorized to operate gas systems, including gas distribution systems, and to that end said municipalities are authorized to drill or purchase a well, or wells, to supply said gas systems within the municipality, or within a radius of five (5) miles of said municipality, provided that the money used therefor is made available out of the gas systems or some other public utility belonging to said municipality."

By authority of that statute the City acquired gas and oil leases in state lands, and in conjunction with the Mark Twain Company drilled thereon four producing gas wells. The City assigned in writing to the Mark Twain Company a one-half interest in the venture. That company, and other parties to the suit whose names it is useless to mention, contributed something over $20,000 in money and services to the enterprise. The City decided that it was not practicable to carry out the purposes of that statute. The Power Company, under its franchise, was still furnishing gas to the inhabitants of the city, and is now.

The City, in consideration of a very substantial sum of money paid by the Power Company, assigned, conveyed and delivered unto the Company all rights, title and interest in the leases and the gas wells, disregarding any claim whatever by the Mark Twain Company. The City contends that it had the right under the law so to do, because the statute involved is void, being in violation of Sections 87 and 88 of the Constitution prohibiting legislation on certain local subjects therein mentioned; therefore, in the execution of the assignment and transfer to the Mark Twain Company it acted *ultra vires*. In other words, the City claims that it owned the entire interest in the leases and the wells, and that the Mark Twain Company owned no interest whatever therein. The City offered to do equity by reimbursing the Mark Twain Company and others for the money and services they had contributed in developing the enterprise. The final decree directs that this be done, fixing the amounts, which aggregated something over $20,000. The Mark Twain Company controverts the position taken by the City. In addition to contending that the assignment and transfer to them was legal and binding on the City, they further contend that if the contrary be true the City is estopped from so contending on account of their

contribution of money and services in the development and operation of the enterprise. The Chancellor held with the City, and we think correctly. All other questions in the case grow out of those, and their determination by the Chancellor is so manifestly correct that an opinion discussing them would be of no benefit to the Bench and Bar.

According to the Federal census of 1930, of which we take judicial notice, Jackson was the only municipality in the State with as many as 35,000 inhabitants. It is at once manifest that the power could never be extended to any other municipality, because no other could ever acquire as many as 35,000 inhabitants or over, *"according to the 1930 census."* Therefore, under the plain language of the statute it has no application to any other municipality in the State, and never can have, except Jackson.

Section 87 of the Constitution provides, among other things, that no special or local law shall be enacted for the benefit of persons or corporations, where a general law could be made applicable. And Section 88 provides, among other things, that general laws should be passed, under which cities and towns may be chartered, and their charters amended. A statute cannot be classed as general when only one municipality in the State can ever come within its operations. 50 C. J. 731, 25 R. C. L. 815, Sec. 23; *Reals* v. *Courson*, 319 Mo. 1193, 164 S. W. (2d) 306; *Marvut* v. *Hollingshead*, 172 Ga. 531, 158 S. E. 28. *Toombs* v. *Sharkey*, 140 Miss. 676, 106 So. 274, is not directly in point, but is illustrative of the principle involved. The question whether the act of the legislature there under consideration violated paragraph O of Section 90 of the Constitution, which prohibits the Legislature from passing local, private or special laws, with reference to certain stipulated matters, one of which is "creating, increasing or decreasing the fees, salary or emoluments of any one officer."

The Court held that chapter 211, Laws of 1924, providing greater compensation for prosecuting attorneys in counties having an "assessed valuation of $2,000,000 or more," and being "in a levee district where a cotton tax is imposed for levee purposes," than in other counties having the same valuation, is local law, violative of that provision of the Constitution.

Manifestly chapter 280, Laws 1940, is a local law, and violates section 88 of that Constitution. It adds to the charter powers of the City of Jackson, and no other municipality in the State. Furthermore, by its very terms no other can ever come under it. That means, of course, that the Mark Twain Company got nothing whatever by the assignment and transfer by the City of the half interest in the enterprise. The City was therefore left with the title to the property which it had no right to acquire and own. Nevertheless, under the law it was not due to throw it away. It was the duty of the City to the public to dispose of it to the best advantage, which it did, under the evidence in this case, when it conveyed it to the Power Company. To illustrate the principle: A municipality, without any authority of law, purchases and pays for a farm for the purpose of operating it. (Manifestly an ultra vires act). It would be its duty to dispose of it to the best advantage. The purchaser from the City would get as good a title as the vendor to the City had. In other words, the disposition of it by the City would not constitute another *ultra vires* act.

The Mark Twain Company argues that the City is estopped to make defense of *ultra vires*, because of what took place after the assignments to it, consisting of the drilling of the four wells, and the expenditure of time and money in doing so.

The City was not estopped to take the position it did. An *ultra vires* contract made with the officers of a municipality does not estop the municipality, since all persons dealing with it are charged with knowledge of the law governing it and limiting the power of its officers. *R. R. Co.* v. *City of Jackson*, 96 Miss. 547, 51 So. 802; *American Oil Co.* v. *Marion Co.*, 157 Miss. 148, 292 So. 296; *Bank of Commerce* v. *City of Gulfport*, 117 Miss. 591, 78 So. 519; 19 Am. Jur. (chapter on Estoppel), sections 166, 168, inclusive.

MISSISSIPPI SUPREME COURT ON SUGGESTION OF ERROR

(Filed February 14, 1944.)

ANDERSON, J.

This cause is here on suggestion of error. The former report of the case will be found in 15 So. (2d) 436. The parties to this cause are: appellants, the Mark Twain Oil Company, a partnership composed of the appellant Bishopric and others, and the appellees, the City of Jackson, the Mississippi Power & Light Company and others, whose names it is unnecessary to mention. The appellants will be referred to as the Mark Twain Company and the appellees as the City and the Power Company.

Some time prior to 1940 the Power Company under a franchise from the City was furnishing its citizens with natural gas. There arose a controversy between them as to the rates that should be charged, which resulted in the City procuring the passage of Chapter 280, Laws of 1940, which follows: "Section 1. Be it enacted by the Legislature of the State of Mississippi, That municipalities of thirty-five thousand (35,000) inhabitants or over, according to the 1930 census, be and they are hereby authorized

to operate gas systems, including gas distribution systems, and to that end said municipalities are authorized to drill or purchase a well, or wells, and to supply said gas systems within the municipality, or within a radius of five (5) miles of said municipality, provided that the money used therefor is made available out of the gas system or some other public utility belonging to said municipality."

By authority of that statute the City acquired gas and oil leases in State lands and other lands and in conjunction with the Mark Twain Company drilled thereon four producing gas wells. The City assigned in writing to the Mark Twain Company a half interest in the venture. That Company and other parties to the suit, whose names it is useless to mention, contributed something over $20,000.00 in money and services to the enterprise. The City decided that it was not practicable to carry out the purposes of that statute, and treating its contract with the Mark Twain Company as *ultra vires* and void filed its bill to have the Court so declare. The ground of the City's case was that the statute violated Sections 87 and 88 of the Constitution prohibiting local legislation with reference to the matter. In the former opinion we so held, but in doing so overlooked Section 89 of the Constitution as construed in *Haas* v. *Hancock County*, 183 Miss. 365, 184 So. 812, and *State* v. *Jackson*, 119 Miss. 727, 81 So. 1. Section 89 provides, among other things, that each House of the Legislature shall have a standing committee on Local and Private Legislation, and that no local or private bills shall be passed by either House until referred to such Committee thereof and shall have been reported with a recommendation in writing that it do pass, stating affirmatively the reasons therefor. It was held in those cases that the presumption was conclusive that that provision of the Constitution had been complied with.

The City argues that nevertheless the decree appealed from should be affirmed because what took place between the parties under the statute violated Section 183 of the Constitution, and for the further reason that it amounted to a surrender by the City of part, at least, of its governmental powers. Section 183 of the Constitution provides, among other things, that no municipal corporation shall make an appropriation or loan its credit in aid of any corporation or association. We are of opinion that both of those grounds are well founded, and we reach that conclusion upon the following considerations: The City entered into a written agreement with the Power Company for the purchase and distribution by the Power Company of the gas output from these wells, disregarding any claim whatever by the Mark Twain Company. The City offered to do equity by reimbursing the Mark Twain Company, and others engaged with it, for the money and value of the services they had contributed in developing the enterprise. The final decree ordered that to be done, fixing the amounts, which aggregated something over $20,000.00. The Mark Twain Company contends that the assignment by the City of half interest in the enterprise was legal, and further that the City is estopped from contending otherwise.

The contract between the parties provides that "the wells are to have supervision and the cost of the supervision to be paid jointly by us and the City of Jackson". The City agreed not only to put in all leases it might obtain from the State, but in addition the Water Works property, the land in Livingston Park, the Airport, or any other lands as it might own. And further if rentals are to be paid to the State the City agreed to pay them. And the City agreed to obtain from the State Mineral Lease Commission such additional lands as the Mark Twain Company might desig-

nate, which were available to the City. The assignment covers the gas rights in apparently about 1,000 acres of land and provides that the wells thereon shall be drilled jointly. In its answer and cross-bill Mark Twain Company prayed for specific performance and that the City might be required to assign to it a half interest in the gas rights in all other lands it might own and prayed for an accounting of the proceeds of all gas which had been produced with interest thereon "figured at a reasonable rate". At different times the City in order to aid the project necessarily made various appropriations out of public funds for that purpose.

Gas can not be divided. In its nature it must all start out in one pipe. To distribute it the streets and alleys of the City must be used for laying pipes. By its very nature the business is continuing, requiring bookkeeping and accounting. The enterprise is necessarily extensive. Everything had to be done with the mutual consent of the parties. It is the duty of the Mayor and municipal authorities to furnish the gas to its inhabitants at as low rates as practicable. On the other hand, the interest of the Mark Twain Company is to get as much out of the inhabitants of the City as possible. By this contract the City authorities have handcuffed themselves in their duties to the inhabitants.

The latter part of Section 135, 37 Am. Jur. 751, is in this language: "It has also been held that where the municipal corporation may lawfully own and operate a public utility, it must be the sole proprietor of property in which it invests its public funds, and that it cannot unite its property with the property of individuals or corporations, so that, when united, both form one property." To support this text, among other cases referred to, is *Ampt* v. *Cincinnati*, 56 Ohio St. 47, 46 N. E. 69, which holds with the position of the City on both grounds, namely that the statute vio-

lates Section 183 of the Constitution and also that the contract surrenders part of its governmental powers to another corporation and therefore its action was *ultra vires*. Section 6, Article 8 of the Constitution of Ohio provides, among other things, that no county, municipality or township shall become a stockholder in any joint stock company, corporation or association whatever, "or to raise money for or to loan its credit to or in aid of any such company, corporation or association." The digest to the case sufficiently shows what the Court decided, which is as follows: "Under Section 6, Article 8 of the Constitution, a city is prohibited from raising money for, or loaning its credit to or in aid of, any company, corporation, or association; and thereby a city is prohibited from owning part of a property which is owned in part by another, so that the parts owned by both, when taken together, constitute but one property. A city must be the sole proprietor of property in which it invests its public funds, and it cannot united its property with the property of individuals or corporations, so that when united, both together form one property. Section 8 of the Act of April 24, 1896, entitled 'An Act to provide for water works purposes in cities of the first grade class' (92 Ohio Laws, 606), is unconstitutional, being in conflict with Section 6 of Article 8 of the Constitution. The remainder of the Act, not depending upon said Section 8, is a valid statute."

The construction of Section 183 of the Constitution was involved in *Jackson Ry. Co.* v. *Adams, State Revenue Agent,* 79 Miss. 408, 30 So. 694. The City of Jackson made an appropriation to the Railway Company, to aid it in furnishing street railway transportation in the City. The City was to have no control over the operations of the railway company. The Court held that the appropriation violated that section of the Constitution. In *Carothers* v.

Town of Booneville, 169 Miss. 511, 133 So. 670, although not exactly in point, is illustrative, our Court again construed that provision of the Constitution. A statute authorizing the town to issue bonds payable from taxes, enabling the town to increase employment, and for that purpose build or lease a garment factory, was held to violate that section of the constitution; and, in addition, "by denying due process."

Clearly it appears that what took place between the Mark Twain Company and the City is ultra vires and void on both grounds. That means, of course, that the Mark Twain Company got nothing whatever by the assignment and transfer by the City of the half interest in the enterprise. The City was, therefore, left with the exclusive title to the property which it had the right to acquire and own. In that situation it was the duty of the City to the public to utilize the gas to the best advantage, which it did under the evidence in this case when it made the arrangement with the Power Company. Its act, therefore, in that respect was not ultra vires. The Mark Twain Company argues that the City is estopped to make the defense of ultra vires because of what took place after the assignment to it, consisting of the drilling of the four wells and the expending of time and money in doing so. There is no merit in that position. An ultra vires contract made with the officers of a municipality does not estop the municipality, since all persons dealing with it are charged with knowledge of the law governing it and limiting the powers of its officers. *Edwards Hotel* v. *City of Jackson,* 96 Miss, 547, 51 So. 802; *American Oil Co.* v. *Marion County,* 187 Miss. 148, 192 So. 296; *Bank of Commerce* v. *City of Gulfport,* 117 Miss. 591, 78 So. 519; 19 Am. Jur. (Estoppel) Sections 166-168.

There is no merit in the argument that the Mark Twain Company is entitled in addition to the return of the value of money, labor and material they put in the enterprise which was decreed by the Court on the ground of doing equity, the value of a half interest in the yield of the wells. To so hold would mean that the contract and dealings thereunder between the Mark Twain Company and the City were valid up to the beginning of this cause and invalid afterwards. In other words, notwithstanding the action of the municipality was ultra vires from the beginning it would be valid up to the time the City filed its bill in this cause. Furthermore, it would be utterly impracticable, if not impossible, to put a value upon what Mark Twain Company would be entitled to under the contract if it were valid.

The decree of the Chancellor requiring the City to reimburse the Mark Twain Company for its outlay in doing the work does not mean that the City was legally liable therefor, but instead that in equity it was not entitled to the relief prayed for without doing so. The application of that principle has nothing to do with whether the contract was ultra vires or not.

It is not advisable to go into the other questions involved in the case. The decree of the Chancellor is so manifestly correct that it would be of no interest to the Bench and Bar of the State.

The former opinion in this case is withdrawn.

SUGGESTION OF ERROR OVERRULED.

ALEXANDER and ROBERDS, JJ., Specially Concurring.

Justices Alexander and Roberds concur in the result reached in the opinion by Judge Anderson, but do not

consider that it is necessary to pass upon the constitutionality of Chapter 280, Laws of 1940, nor to construe Section 183 of the Constitution of 1890 as applicable to the situation here.

We think this contract is *ultra vires* and invalid because it was not authorized by, nor embraced within, said Chapter 280.

That special act confers upon said municipalities the power to "operate gas systems, including gas distribution systems, and to that *end* said municipalities are authorized to drill or purchase a well, or wells, to supply said gas systems within the municipality * * *." As stated in the main opinion, the contract in question and the rights of the parties thereunder are indivisible and inseparable and must be exercised, if exercised at all, by mutual consent; therefore, by merely refusing it consent, the other party could prevent the municipality from performing its duty to the inhabitants thereof and from exercising its functions as contemplated by said Chapter 280. There would be no way to force the co-partner to agree. This litigation illustrates that situation; the parties are already in disagreement, with litigation resulting therefrom. This contractual relation is indefinite and there is no way to end it. The contract contains no expiration date. It might continue for many years. There is no way to terminate it judicially except as is here done in the main opinion. There can be no partition of the gas which may be produced thereunder. The other parties to it were charged with notice of the powers and lack of powers of the municipality. It is being reimbursed, with interest, everything which it put into the venture. To pay them the value of what they supposedly acquired would be to validate the contract.

ON SUGGESTION OF ERROR.

SMITH, C. J., Separate Opinion.

No question of the violation of Section 183, or any other Section of the Constitution, here arises for two reasons: (a) Chapter 280, Laws of 1940, does not authorize municipalities to operate a gas distribution system in connection with an individual or corporation, each sharing in the management and profit or loss thereof; (b) the contracts by which the appellant acquired a half interest in these gas leases do not provide for the operation of a gas distribution system jointly, or as partners by the City and the appellant.

I am of the opinion, (1) That the City had the right to contract with the appellant to finance the drilling of these wells, for which the appellant was to receive a one-half interest therein, and to convey to the appellant a one-half interest in the leases on which the wells were drilled; (2) That under these contracts the City and the appellant each own a half interest in these gas leases and that the City was without the right to sell the output of the gas wells thereon and appropriate the money received therefor to its own use but should account to the appellant for the value of his interest therein, which the appellant by his cross-bill seeks to recover. The appellant and the City are tenants in common of these gas leases and if the City desires to operate the wells thereon exclusively for its own benefit and the appellant should refuse to sell his interest therein to the City, it, of course, has the right to have the leases on which the wells are situated sold for a partition of the proceeds of the sale.

Since three members of the Court are of the opinion that these contracts were ultra vires and not binding on the City, the decree of the Court below can not be reversed on

the ground I hereinabove set forth; that being true I concur in Judge McGehee's opinion as to what, in this aspect of the case, the decree of the Court below should have been.

ON SUGGESTION OF ERROR.

(February 14, 1944.)

McGEHEE, J., Dissenting in part.

The principal question presented for decision in this case, which is unaffected by some of the conclusions of law set forth in the controlling opinions herein on suggestion of error, is whether or not the City of Jackson has offered to do that which, in equity and good conscience, is required to be done as a condition precedent to its alleged right to obtain from a court of equity the cancellation of the two assignments in controversy which were executed by the City in favor of the defendants for a one-half interest in four producing gas wells, which were located and brought into being mainly through the efforts of the assignees under such assignments, even if we were justified in holding that the municipal authorities were without power to eexcute the same.

The authority of the municipality to drill or purchase these gas wells for the purpose of supplying its inhabitants with gas is expressly conferred by Chapter 280, Laws of 1940, if the conditions set forth therein are complied with, and the constitutionality of which is being upheld by the vote of all of the judges in the decision now being rendered herein. Moreover, the general rule is that unless a statute contains some express or implied restraint, the municipality has a reasonable discretion in the choice of the means or methods for exercising the power given it for a public

purpose. 19 R. C. L., p. 770; 43 C. J. p. 249; 1 McQuillin, Municipal Corp. (2d Ed.), pp. 964-5.

If the municipality has the power to drill or purchase gas wells for the purpose authorized by said Chapter 280, Laws of 1940, supra, then it necessarily follows that it has the right to cause such wells to be located and drilled by others experienced and skilled in the business of drilling gas wells. This being true, it also follows that the municipality in the exercise of the power conferred by this statute may either assume all the risk and procure the wells to be located and drilled at a fixed price or compensation for such services or cause a part of the risk to be assumed by others who are to give of their time, labor, and expense to the success of the project in consideration of an assignment of an interest in the wells if and when the production of gas is obtained, and with the right on the part of such municipality to then re-acquire such interest at fair value. Most assuredly, if it has the power to purchase a well or wells, as authorized by this statute, it would be authorized to acquire an outstanding one-half interest in them in order to carry out the purposes of this legislation. And, it is especially true that the municipality could have procured the drilling of these wells in consideration of the execution of the assignments involved, where the other contracting parties were to receive nothing for their time, labor, and expense in the event no production of gas was had. That which could have, therefore, been lawfully done—the reacquirement of the outstanding one-half interest assigned—equity will require an offer on the part of a complainant to do when seeking affirmative relief against this solemn agreement here under consideration, which may, in some respects, be *ultra vires*, before the court will lend its aid to an attempt by the municipality to appropriate and sell the

entire output of the properties without doing what is right, just and equitable under the circumstances.

There is no difference of opinion among the judges on the proposition that the complainant is required to do equity as a condition precedent to obtaining the relief sought in this case, but we are not in accord as to what should be deemed just and equitable under the circumstances here involved. The municipality in asking a cancellation of the assignments on the ground that it was without power to engage in a joint enterprise with the assignees for marketing the gas and dividing the profits of such business undertaking, like unto a partnership venture — involving the sharing of a responsibility by its public officials with other persons in supplying gas to its inhabitants and requring the consent of the assignees to the various steps necessary to be taken in the proper conduct of the business — has not offered either to account to the assignees for one-half of the proceeds derived from the sale of gas to the local public utility each month up to the date of the decree herein appealed from and pay the value of their one-half interest in the wells as of the time of rendition of such decree or the value thereof as of the date when the municipality took complete charge of the common property and began to appropriate the entire output of such wells to its own use. Nor has it asked that these wells which the municipality owns as a tenant in common with the assignees shall be sold for a partition of the proceeds in order that it may legally acquire such outstanding one-half interest so as to be able to sell such gas as its own property to the public utility now engaged in the distribution thereof to the public. And this is true notwithstanding the fact that the municipality is receiving and retaining a very considerable revenue each month from the sale of the gas, under the claim of sole ownership thereof, contrary to the

doctrine against the allowance of an unjust enrichment under such circumstances.

It may be conceded, for the purpose of this decision, that after the defendants, as assignees under the assignment, had acquired a one-half interest in the four producing wells in consideration of the risk assumed and the time, labor, and money expended both in locating and drilling the same, the municipal authorities were without power to engage in the alleged partnership relation that would be involved in the business venture of marketing the gas and dividing the proceeds derived from these properties. But such fact would only relieve the municipality from the performance of the *ultra vires* acts contemplated in such an undertaking, and would not entitle it to take over the complete control of the property and appropriate the fruits of its bargain to its own use in the manner shown in this case without any offer on its part to do equity in the premises. "It is one of the oldest of equity principles, that when a party seeks the interposition and aid of a court of chancery as against his adversary, the court in extending its aid will require as a condition thereof that the complaining party shall accord and render unto the adversary party all the equitable rights to which the latter is entitled in respect directly to the subject matter of that suit, and this is true even as to many of those things which the defendant could not compel by an independent suit," (Griffith Chan. Prac. Sec. 43, p. 46) wherein the maxim, "He who seeks equity must do equity", is discussed. Again, it was said in this text, Section 522, that if a party shall "seek to set aside or cancel any contract or other transaction, or to restrain any proceedings thereunder he shall not have relief unless he restore to the defendant the fruits that have been gathered by complainant from that transaction; and ordinarily this is true even if the transaction be illegal."

It cannot be said that the municipality could have thought that a proposal in the outset of its negotiations with the defendans could be deemed just and equitable that involved the suggestion that the wells be located and drilled with the understanding that in the event gas was produced in commercial quantities the latter should receive a bare reimbursement for their time, labor, and expense, and that, on the other hand, they should receive nothing. Yet, the municipality now insists that equity requires the doing of just that thing as the full measure of the rights of the defendants and that only. The contrary principle was announced in 14 C. J. 586, Section 2529, when it was stated: "So where an equity court sets aside as *ultra vires* a railroad construction contract, it does so on the principle of compelling the corporation to account for what it has received in partial performance, not on the basis of a bare reimbursement, but on a fair compensation, such as any other railroad contractor would receive under similar contract, if it were within the power of the corporation to make."

Because of the alleged unconstitutionality of said Chapter 280, Laws of 1940, supra, the municipality contends that it was without authority, in the first instance, to drill the wells or cause the same to be drilled, and that, therefore, the assignments of a one-half interest therein to the appellants is *ultra vires* and void, as well as the undertaking on the part of the municipality to contract with the assignees for the future conduct of the business of marketing the gas and dividing the profits between the municipality and the said assignees. But I am of the opinion that, without regard to whether or not the municipality has the right to go forward with the performance of the alleged partnership relation for the marketing of gas and dividing the profits of such an undertaking, it was, nevertheless, vested

with full power and authority — since we are holding the act in question to be constitutional — to procure the drilling of the gas wells here involved, and to convey or assign a one-half interest therein in payment for the services rendered by the assignees in locating and drilling the same.

The court below in requiring the complainant municipality to refund to the defendants only the actual expenses incurred for the labor expended and the equipmnt furnished, did not require the doing of complete equity between the parties. The degree in that behalf utterly ignores the risk taken by the defendants of receiving nothing for their time, labor, and expense in the production of gas if no gas had been obtained in this field where the gas supply was then thought to be practically exhausted. In other words, that which is sought to be done here by the municipality brings to mind the story of the white man and the Indian, who, during the pioneer days, had gone hunting together and killed four wild turkeys and one crow. When the time came for a division of the game, the white man proposed to the Indian: "Now, I will take the turkeys and you take the crow, or you take the crow and I will take the turkeys." And thus it was that there came into use the saying, "He never did say turkey to me."

Neither the state nor any of its governmental subdivisions can either afford or be permitted in a court of equity to do less than full and complete justice in its dealings with the citizen in regard to the fruits of its *ultra vires* contracts thus solemnly and freely entered into. If it be said that the defendants entered into the undertaking here involved at a time when they were charged with knowledge under the law as to the extent of the power and authority vested in the officials of the municipality, then it is also true that the municipality was charged with knowledge of such extent and limitations of its authority in the premises,

and, as a matter of fact, was in better position to be familiar with the limitations of its power in the instant case than were the defendants who were residents of a distant state.

There are other rights claimed on behalf of the appellants which, in my opinion, they are entitled to assert in this proceeding, such as the reformation of the assignments so as to include all of the wells located and drilled and intended to be embraced therein; but it is unnecessary to discuss that feature of the case since the decree of the court below is being in all respects affirmed anyway by the controlling opinion herein.

From the foregoing views, it follows that I am of the opinion that the bill of complaint should have been dismissed unless it was amended so as to contain an offer to do full and complete equity in accordance with the views hereinbefore expressed, and that thereupon the cross-complainants should have been granted such relief as in law and equity they were entitled to have and receive.

Griffith, J., and Smith, C. J., concur in this opinion.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 241

ALLISON BISHOPRIC, MARK TWAIN OIL CO., W. B. SHAFFER, AND NATIONAL SURETY CORPORATION,

Petitioners,

vs.

CITY OF JACKSON, MISSISSIPPI, AND MISSISSIPPI POWER & LIGHT COMPANY,

Respondents.

BRIEF OF THE CITY OF JACKSON IN RESPONSE TO PETITION FOR CERTIORARI.

W. E. MORSE,
Atty. for the City of Jackson.

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SUPREME COURT OF THE UNITED STATES

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BRIEF OF THE CITY OF JACKSON IN RESPONSE TO PETITION FOR CERTIORARI.

A restatement of the facts in the case should be made for clarification before responding to the petition or brief. The Record presents three cases consolidated by order of the Lower Court:—Suit No. 28,901, styled "J. L. Harper vs. Allison Bishopric, City of Jackson, et al.; Suit No. 29,050, styled, "City of Jackson vs. Mississippi Power & Light Company, et al.", (Page 1, Record); and Suit No. 29,532, styled, "Mrs. Louise Cross Simpson vs. City of Jackson", (Page 73 of Record, Pages 193-194 Record).

Suit No. 28,901 was filed in March, 1941. There was an answer and cross-bill of the City of Jackson to this suit, embracing petitioners Bishopric, Shaffer and Harper. This answer and cross-bill is shown on Pages 40-49 inclusive of Record. The answer and cross-bill of the City set up that the dealings between the City, Bishopric, Shaffer and Harper were ultra vires, null and void, and beyond the scope and power of the City and the prayer was that the contract and assignments which were made a part of the cross-bill be decreed to be null and void on account of having been beyond the scope of the City so to make, and subject only to the rights of the petitioners to recover for the money actually expended by them plus interest. Bishopric, et al., filed an answer in Proceedings No. 28,901, shown on Pages 57-64 inclusive of Record. They also filed a cross-bill in Proceeding No. 28,901, praying for reformation of the assignments, specific performance of their contract, and petitioned that the City be required to execute leases on other lands to them. They also prayed in Prayer #3 that after the City had repaid itself for the money it had advanced (or loaned) Allison Bishopric, et al., that they be awarded judgment; and prayed for damages in the sum of $50,000.00, being for the sale of gas claimed by them in their cross-bill to have a value of 30¢ per mcf.

One of the wells was located on property not embraced in the lease, and to adjust the equities between the parties, the Suit No. 29,050 was filed. Pages 1 to 36, inclusive of Record. This original bill brought in many new parties, as under Miss. Decisions, *Ladner* v. *Ogden*, 31 Miss. 332, *Bishop* v. *Miller*, 48 Miss. 364, *Wright* v. *Frank*, 61 Miss. 32, persons not parties to the original bill cannot be made parties to cross-bill. The City filed Suit No. 29,050, as shown on Pages 1-36 inclusive of Record, which petition sought to adjudicate all equities between the parties.

Bishopric, Harper and Shaffer came to the City and proposed to drill a gas well. Page 74 of Record. W. B. Shaffer was to have 11¼% interest, J. L. Harper 36% and Allison Bishopric was to have 52% interest (Pages 113 and 125, Record).

Shaffer had been in the oil and gas business in Arkansas, Kansas and Oklahoma since 1922. Page 121 of Record. Bishopric was experienced in oil and gas in several places, including Canada. Page 152 of Record. The agreement under which the joint venture is shown on Page 23 of the Record, in Suit No. 29,050. It is the same as Exhibit "A" to the City's cross-bill in Suit No. 28,901. Page 49 of Record. Under it Harper, Bishopric, and Shaffer proposed to the City that they would assist in the development of natural gas. The proposal stated:

> "We agree not to assign privilege (gas) without the consent of the City of Jackson, or upon the condition that gas available and produced be made available to the City." (Par. 6, Page 24, Transcript.)

Four wells were drilled, three of which were producers and one dry hole. Unknown to either party, the first well was drilled on the property of Mrs. Simpson, and was not embraced in the State's lease. Pages 132-133, Transcript. Mr. Bishopric was supposed to have put up one-half the money for the drilling of the wells, but he did not do so. Pages 78, 85, 86 and 107 of Record. Mr. Bishopric admitted owing on the fourth well the sum of $5,856.68 (Pages 157-158, Record). He wanted to use the credit of the City to this extent until he was reimbursed out of the sale of gas. (Pages 149-157-158 of Record.) This is in violation of Sec. 183 of the Mississippi Constitution. The first well was brought in in July, 1941 (Page 114 of Record), at which time an assignment was made by the City to Bishopric, Shaffer and Harper of a certain interest in approximately

240 acres of leases (Pages 27, 28, 29 of Record.) At the same time there was an assignment of an overriding 1/20th interest.

The City needed the gas for the people of Jackson. (Page 74 of Record.) After the gas came in, Harper, Shaffer and Bishopric were not interested in selling unless they could get the highest price (Page 118 of Record—130 and 131). Bishopric said he wanted to get every penny out of it he could (Record, 165).

The United Gas was paying 4½¢ per mcf. in the Jackson field, one well being within one-fourth mile of Fee No. 3 Well (Record, 109-182-183). The Miss. Power & Light Company had the franchise to sell gas in the City of Jackson. Exhibit "A", Pages 19-25, inclusive, Record. This franchise had a contract rate feature advantageous to the City as long as gas could be produced in sufficient quantities to meet the demands of the City of Jackson and its industries in the Jackson Area (Sec. 2, Franchise, Record, 21). And that is the reason the City was interested in getting gas (Record, 74).

The City had no authority to enter into such an agreement unless it be under Chapter 280, Laws of 1940, or Sec. 3396, Code of 1942. On August 28, 1941, Bishopric, and Shaffer were advised that the City would not sell gas to outside parties unless there was more than sufficient to meet the needs of local demands. Their reason for drilling was to stabilize gas rates, and that it would be necessary to sell to the Mississippi Power & Light Company (Pages 87-88, Record). The answer to this letter, dated Aug. 30, 1941, states that it is purely a business proposition in which Shaffer, Harper and Bishopric want to dispose of the gas to the best advantage (Record, 140-141). On Sept. 24th, 1941, Bishopric advised the City not to do anything without his approval. On November 12th, 1941, Bishopric warned the

City not to hook up the gas wells, after waiting for some agreement from July to November. The three gas wells were hooked up, and the proceeds sold to the Mississippi Power & Light Company (Record, 30-32, inc.). The gas from the wells to be used in the Jackson distribution system and not to go into the gathering system, which transported gas to towns other than Jackson. Sec. 2 of Agreement, Record, 31. The City, in December, 1941, discovered that Fee No. 3 well was located on the Simpson property and not on their lease. The City had already assigned one-half the lease and 1/20th override on the SW¼ of Section 25, Township 6 North, Range 1 East, First District of Hinds County, Miss., but asked contribution from Shaffer, et al., for acquiring the outstanding interest in the lease whereon Fee No. 3 well was located. Record, 132-133. Shaffer claimed one-half fee No. 3, or, 240/480ths, though the City could acquire only 320/480ths, and Bishopric did not want to participate in the Cost. Record, 177-178.

The Power & Light Company filed an answer admitting the allegations of the City in Suit No. 29,050. There was no decree prayed for against the Power & Light Company by Harper or Bishopric in Cause No. 28,901, nor by the City in No. 29,050. Bishopric, Shaffer and Mark Twain Oil Company did not file an answer, but the decree of the Court in the Consolidation (Record, 73) provided that the answer and cross-bill in Cause No. 28,901 would be considered and treated as their answer and cross-bill in Cause No. 29,050, and the answer of the City of Jackson to their cross-bill is shown on Pages 64 to 73, inclusive, of the Record.

The Lower Court held that the contract was ultra vires, void and beyond the power of the City to make, and refused to order specific performance of the contract as prayed for by petitioners in Cause No. 28,901, and denied them other

reliefs prayed for (R. 56) and taxed them with the cost (R. 194). The same contentions of petitioners were refused in Cause No. 29,050, and on account of the contract being ultra vires, void and beyond the power of the City to make, all matters dealing therewith were held to be ultra vires and void, insofar as they affected Bishopric, Shaffer, and Mark Twain Oil Co., and the same were cancelled (R. 191). The Supreme Court of the State of Mississippi in the two decisions arrived at the same conclusion.

The proof showed that the City of Jackson did not own or operate a gas distribution system (P. 101).

Response to the Summary Statements Involved in the Petition.

The Chancery Court and the Supreme Court of the State of Mississippi held that the City of Jackson did not have authority under Chapter 280, Miss. Laws of 1940, to make the contract with the petitioners, and that its acts were ultra vires. This law only applied to municipalities " 'that operate a gas system or a gas distribution system' are authorized to drill or purchase a well or wells to supply *said* gas system * * *" etc. The City of Jackson, in its effort to maintain their franchise with the Mississippi Power & Light Company (Exhibit "A", P. 19-23 inc., R.) was interested in getting gas sufficient to supply the demands of the City of Jackson and its inhabitants and its industries, so that it could maintain the advantageous rates that it had by a contact franchise (P. 84). (Section 2, Pages 20-21, Record.)

Petitioners, in propositioning the City in April 1941, stated:

> "In order to further the City in its development of natural gas, we make this proposition * * * (P. 23, R.) We agree not to assign this privilege without

> the consent of the City or upon the condition that gas available and produced be made available to the City." (Sec. 6, P. 24, R.)

After the wells came in, petitioners were not interested in selling unless they could get the highest price (P. 118-130-131-165, R.).

The market price paid by the United Gas was 4½¢ (P. 109-182-183, R.). The amount paid to the City for gas was average $0.9.113 per mcf. Petitioners wanted 30¢ per mcf. (P. 56, R.)

Shaffer, Bishopric, et al., never completed the contract but illegally and unlawfully used the credit of the City to the tune of one-half interest in the last well, the amount of money being $5,856.68 (R. 52, 157, 158).

Petitioners wanted the City to pay itself out of gas if, as and when sold. Petitioners were unwilling to accept 9.113¢ per mcf. Petitioner Shaffer wanted 16¢ (R. 122); petitioner Bishopric wanted 20¢ (R. 155), while they asked 30¢ in their bill (R. 54-56). The sale price to resident consumers in Jackson is 30¢ per mcf. for Jackson gas. (Pages 19-23 inclusive.) The Supreme Court first held the act of the City was ultra vires and void because Chapter 280, Miss. Laws of 1940, violated Sections 87 and 88 of the Constitution. On Suggestion of Error the Supreme Court withdrew this opinion on account of *Feemster* v. *Tupelo*, 83 Miss. 804. The new opinion of the Court held that the acts of the City were ultra vires, void, and beyond the power of the City. Justice Anderson, in re-writing his opinion, holding that the act was a violation of Chapter 183, of the Constitution of the State of Mississippi of 1890, and was therefore ultra vires. Justices Roberds and Alexander holding that the acts of the City were ultra vires and void, and the three justices approving the measure of recovery allowed by the lower court to the petitioners;

which was the full amount of money advanced, full compensation for any geographic or geophysic services rendered, plus accrued interest. Judges Griffith and McGee held that this contract was ultra vires and void, but that the measure of recovery by the petitioners should be different. One Justice holding that the Act, Chapter 280, was constitutional, and that it was within the power of the City to make the contract.

The Federal Constitution does not guarantee that decision of State courts shall be free from error or require that pronouncements shall be consistent. *Western County Trust Co.* v. *Riley*, 58 S. Ct. 185, 302 U. S. 292, 82 L. Ed. 268.

Petitioners state that it was without dispute the municipality did not lend any credit to petitioners but on the contrary petitioners paid their money, which was used in the venture. Petitioners used the City's credit on all ventures, paying thirty days thereafter, and refused to pay for their part of the dry hole venture (P. 157-158, R.). Petitioners now state that they have been deprived of their property, without due process of law under Art. 14, Section 1, of the Amendments to the Constitution of the United States, and base the jurisdiction of this Court under 28 U. S. C. A., Section 344-B.

The immediate complaint seems to be that petitioners only had a right to one Suggestion of Error in the Supreme Court of Mississippi.

The Chancery Court of Hinds County and the Mississippi Supreme Court based their decision on the fact that the acts of the City of Jackson in letting the contract and making the assignment was ultra vires, void and beyond the power of the City so to do. The constitutionality of the statute having no bearing on the question as to the Acts of the City, except that one of the judges stated that in his opinion the act was not unconstitutional, while another judge was of the opinion that this Section violated

Section 183, Mississippi Constitution. A majority of the court were of the opinion that the acts of the City were ultra vires. Petitioners state:

> "The Court will not be burdened with a re-statement of the facts but this court cannot find in this record one scintilla of evidence to support the majority of opinions of the State Court, that the credit of the municipality was lent the petitioners in violation of Section 183, Mississippi Constitution." (For our Answer see Pages 78, 85, 86, 107, 157, 158, Record.)

The Suggestion of Error filed by petitioners in the State Court being No. 3 Suggestion (P. 201-202, Record) takes the position that the opinion of the court impairs the obligation of a contract and takes complainants' property in violation of state and federal constitution. The Suggestion of Error in the State Court stated that under the *Feemster* case there was a rule of property and if the Court overruled it, it would be depriving petitioner of his property without due process of law (P. 202, R.).

The old doctrine that former decisions of the various courts constitutes a rule of property is fallacious and has been repudiated by the Supreme Court of the United States, by the State of Mississippi, and by a majority of the Courts of the land.

The Federal Courts must follow state statutes and decisions in all cases except as provided by the United States Constitution or Acts of Congress, thus overruling the federal general common law doctrine. *Erie R. Co.* v. *Tompkins*, 58 S. Ct. 817, 304 U. S. 62, 82 L. Ed. 1184.

> "The State Court rendered erroneous decision on question of State law, or overruled principles established by previous decisions on which party relied, does not confer appellant jurisdiction on Federal Supreme Court." Brikenhoff-Faris Trust & Savings Co. vs. Hill, 50 S. Ct. 451, 281 U. S. 673, 74 L. Ed. 1107.

"The meaning attributed by the highest court of a state to a statute of the state must be accepted by the U. S. Supreme Court on review as though it had been specifically expressed in the statute." See Supreme Lodge vs. Myer, 265 U. S. 30, 44 S. Ct. 432, 68 L. Ed. 885, Appleby vs. City of New York, 46 S. Ct. 569, 271 U. S. 364, 70 L. Ed. 992.

"Whether or not a state court exceeded its function under the state constitution cannot give rise to questions respecting due process of law, which will sustain appellant jurisdiction of the Federal Supreme Court." Berk vs. Smith, 27 S. Ct. 37, 51 L. Ed. 121.

"United States Supreme Court is bound by decisions of the highest court of the state as to the powers of their municipalities." Railroad Commission of California vs. Los Angeles R. R. Commission, 50 S. Ct. 71, 280 U. S. 145, 74 L. Ed. 234.

The petitioners base their principal complaint on the fact that they did not have authority to file the second Suggestion of Error in the State Supreme Court.

"A decision of a state court resting on grounds of state procedure does not present a federal question." Gibson vs. Miss., 162 U. S. 565, 16 S. Ct. 904.

"Matters affecting the remedy are governed by the laws of the forum and a decision of the State Court on matters of state pleading or practice are not reviewable by the U. S. Supreme Court." Cent. Vermont R. R. Co. vs. White, 238 U. S. 507.

"The decision of the Supreme Court of the State on the Second Opinion that it will not re-open the questions involved in a federal defense presented by new pleas filed after the case was sent down for new trial merely settles a question of practice and does not present a federal question." Yazoo R. R. Co. vs. Miss., 180 U. S. 1, 20 S. Ct. 240, 45 L. Ed. 395.

Section 2391, Miss. Code of 1930, is the same as Section 3396, Miss. Code of 1942. Under this Section municipalities may sue and be sued, may purchase and hold real estate, may contract and be contracted with, but, unless

express statutory powers are given to the municipalities to deal in a particular way, there is no presumption in the State of Mississippi to be indulged in that the municipality has such powers.

The case of *Edwards House* v. *City of Jackson,* 132 Miss. 710, 96 So. 170, was a suit to enforce contract with the City such as petitioners have brought here. In that case the Edwards Hotel had contracted with the City for a tax exemption, which could be a legitimate exemption under the statute. They contracted to lease the City a street known as Esaw Street. The City had the right to purchase. The Court held that it was ultra vires and a void contract for the City to pay annually a sum of money equal to the tax on designated property for the lease of that property.

This same contract was then sued on in the case of *Edwards House* v. *City of Jackson,* 138 Miss. 644, 103 So. 428. The Court said in part:

> "The authority of a municipality is limited by the authority granted to it by the Legislature, and all persons who deal with a municipality are presumed to know the powers thereof, and the plaintiff in this case was aware of this rule of law. See Edwards Hotel & City St. R. Co. vs. City of Jackson, 96 Miss. 547, 51 So. 802. The Edwards Hotel Company also knew that the City of Jackson could not contract except in pursuance to the authority given to it by the Legislature. See Steitenroth vs. City of Jackson, 99 Miss. 354, 54 So. 955:
>
> " 'It is elementary law that municipalities have no powers, except such as are delegated to them by the state, either expressly or by necessary implication; and there is no distinction in this respect between governmental powers and those of a private or business nature. The powers of the municipality are granted to it, and must be exercised solely, for the benefit of the inhabitants thereof.' Steitenroth vs. City of Jackson, 99 Miss. 354, 54 So. 995.

"'The charter powers of a municipality are to be construed most strongly against a right claimed by it and not clearly given by the statute. When there is any doubt as to whether or not a municipality has the power to do or not to do a particular thing, this doubt should be solved against its charter powers, unless it is plainly manifest that the power is confided to the municipality to act.'"

"See Crittenden vs. Town of Booneville, 92 Miss. 277, 45 So. 723, 131 Am. St. Rep. 518. The sections of the void contract above quoted are, in our opinion, void because they undertook to have the city lease or rent property for street purposes, and there is no express or implied power in a municipality in Mississippi to thus establish a street. The only power conferred is to acquire a street in the statutory manner, and leasing a street for a stipulated price of $3,000 per annum, or for any other sum as to that particular stipulation, was of itself ultra vires and void."

The above case was upheld in the case of *Tullos* v. *McGee*, 181 Miss. 288, 179 So. 558, wherein the Court stated as follows:

"Appellant contends that by virtue of the authority of the statute conferring the power upon municipalities to install and maintain a waterworks system, there is given as an incident to such authority the right to employ some one to operate the plant and to fix his compensation therefor. This is true as regards contracts reasonably necessary and expedient for the accomplishment of that purpose. However, it is beyond the power of municipal officers to bind their successors in office to the exercise of their discretionary authority to fix the compensation of employees engaged for the performance of services rendered to the public. Such a contract, being ultra vires, does not estop the municipality, since all persons dealing with it are charged with knowledge of the laws by which it is governed, which limit the power of its officers. Only such powers are possessed by a municipality as are expressly conferred by statute, together with those granted by

necessary implication by what is expressed in terms, and such powers as are either express or implied are the powers of the municipalities, and not of the officers who represent them.

"It is necessary to hold under the authority of Edwards Hotel Co. vs. City of Jackson, 96 Miss. 547, 51 So. 802, and Edwards House Co. vs. City of Jackson, 138 Miss. 644, 103 So. 428, 42 A.L.R. 625, and the cases therein cited, that the contract in question is ultra vires, and there unenforceable, as attempting to fix the compensation of a city employee to cover a period of employment extending beyond any reasonable limitation. Therefore the judgment of the circuit court must be affirmed."

The three cases were consolidated in the lower Court (R. 73). The decision of the lower court embraced three cases (R. 194). The judgment of the Supreme Court affirmed the Chancery Court of Hinds County (P. 200, Record).

Decision on appeal from decrees consolidated suits held not reviewable on certiorari where petition of certiorari complained only of decision in other respects. *Johnson* v. *Manhatten,* 289 U. S. 479, 53 S. Ct. 721, 77 L. Ed. 133; and further, certiorari on petition of one party to a joint judgment must be denied by the Supreme Court of the United States where the record fails to disclose summons and severance. *Morganthau* v. *Stevens,* 55 S. Ct. 542, 294 U. S. 720, 79 L. Ed. 1252.

We respectfully submit that there is no federal question, and the petition for certiorari should be denied.

Very respectfully submitted,

W. E. Morse,
Atty. for the City of Jackson.

(33)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 241

ALLISON BISHOPRIC, ET AL.,
Petitioners,

vs.

CITY OF JACKSON, ET AL.,
Respondents.

REPLY OF MISSISSIPPI POWER & LIGHT COMPANY TO PETITION FOR CERTIORARI

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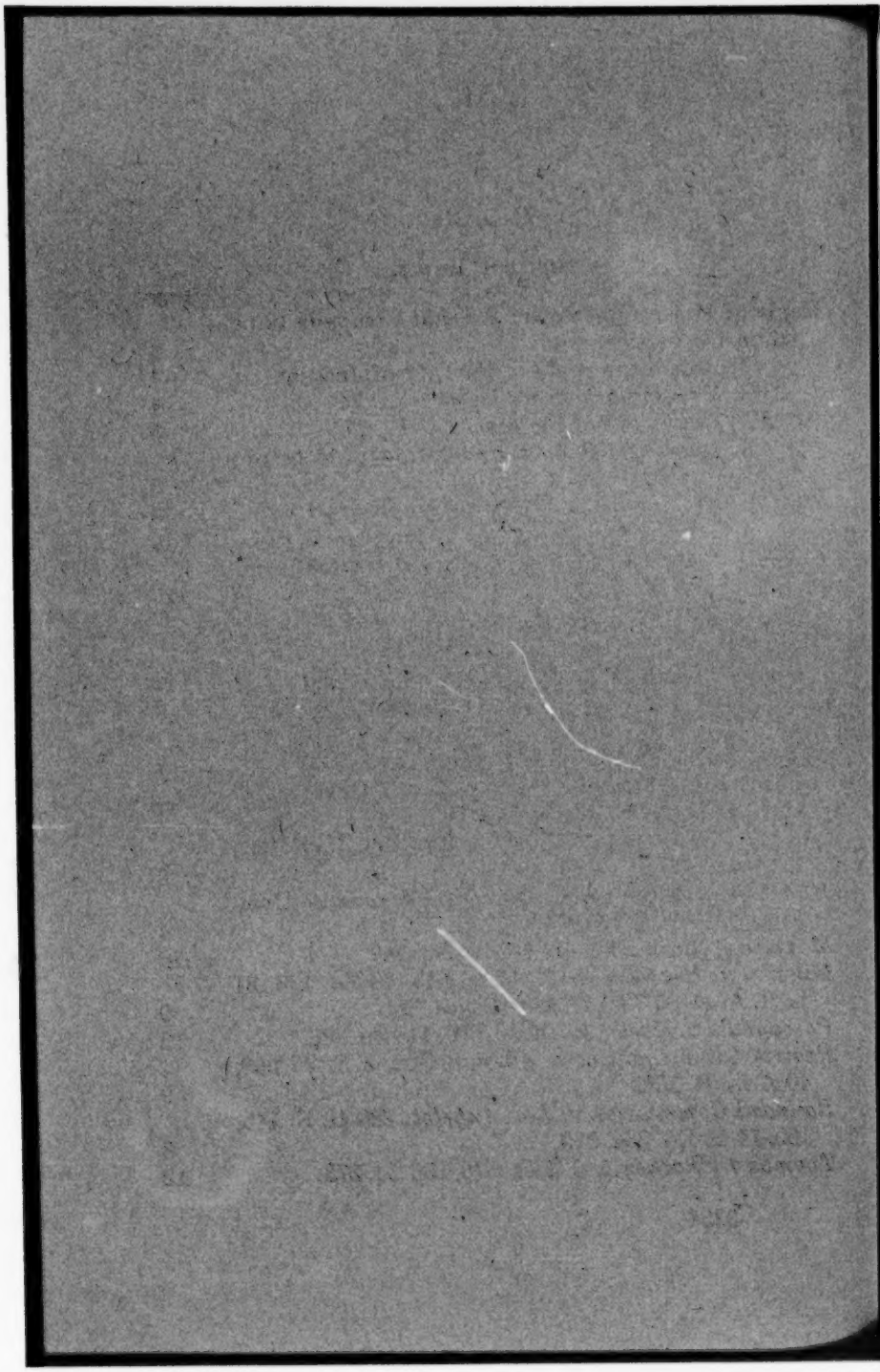

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SUPREME COURT OF THE UNITED STATES

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REPLY OF MISSISSIPPI POWER & LIGHT COMPANY TO PETITION FOR CERTIORARI.

I. Joinder in Reply of the City of Jackson.

Mississippi Power & Light Company, herein called "Power Company", adopts in its entirety the reply to said petition of the City of Jackson, herein called "City", and urges each point therein made, so far as applicable to Power Company, but due to the controversy wherein the Power Company is involved being separate and distinct from that wherein the City is involved, it is requisite that the Power Company supplement that reply of the City as is herein done.

II. Preliminary Remarks.

The City instituted suit against Allison Bishopric, Mark Twain Oil Company, W. B. Shaffer, herein called "Petitioners", and others, Cause No. 29,050, in the Chancery

Court of Hinds County (R., 1-34), whereto Power Company was a party, not being a party to or interested in No. 28,901, *J. L. Harper* v. *Allison Bishopric* (R., 40) except as garnishee as hereinafter set out, or No. 29,533, *Mrs. Louise Cross Simpson* v. *City of Jackson* (R., 73). The Power Company answered in No. 29,050 (R., 36), setting up the valid acquisition from the City of all gas produced by City from the wells in controversy, whereasto Petitioners sought to establish as against the City, in possession and operating, an undivided interest with an overriding royalty.

Petitioners filed a cross bill solely against the City (R., 49), whereto the Power Company was not a party, and prayed the City "be required to execute to * * * (Petitioners) a lease on its land and an assignment of all interest acquired * * * ; (3) after crediting * * * (Petitioners) * * * with any monies justly due it on said drilling operations * * * by (City) * * * that * * * (Petitioners) * * * be awarded a decree against * * * (City) * * * for their reasonable interest in all gas drawn from said wells and converted by * * * (City) * * * as aforesaid, calculated * * * at the reasonable price of 30¢ per m.c.f. *delivered at the gate of Mississippi Power & Light Company* in the aggregate present amount of $50,000.00, and that such rate or market price be decreed as reasonable." (R., 56)[1]

Thereafter, consolidation was had for trial (R., 73). The Power Company is a party in No. 29,050 only. There is no pleading against the Power Company by the Petitioners asking any relief whatsoever, though the City, in No. 29,050, whereto Petitioners were parties, sought recovery from the Power Company for the gas delivered from all wells. Had Petitioners objected thereto (the Power

[1] Italics ours unless otherwise noted.

Company not controverting the City's demand in the absence of objections by Petitioners), under local practice, this was the place whereat Petitioners should have so done. 9 *Miss. Digest*, Title "Judgment", especially Key No. 713 (2). Petitioners admitted in their Reply Brief in the Supreme Court of Mississippi on Suggestion of Error: "The court must bear in mind at this point that no issue was made in the trial court between appellants and Mississippi Power & Light Company of its wrongful and improper conversion and use of such gas under the circumstances. This appeal as against the utility was taken solely for the purpose of preserving such right to dispute such matter with the utility another day." (Page 2.)

J. L. Harper, a member of the partnership, instituted suit No. 28,901, against Allison Bishopric, et al., petitioners, and that in said suit sought to be garnished was the amount due by the Power Company to the City for the gas delivered from these wells by the City to the Power Company, whereasto, in that bill, not herein transcribed, Harper, co-partner, averred:

> "* * * Said City of Jackson * * *, acting for itself, for your complainant and for the defendants, Bishopric and Shaffer, entered into a gas purchase contract to sell all of the gas proceeds from said wells to the Mississippi Power & Light Company, * * * and * * * it was the intention of the City * * * to collect all of the proceeds from the working interest in said well and to retain 45% thereof and to distribute the remaining 55% thereof to your said complainant, Bishopric and Shaffer to be divided by them in accordance with said oral agreement. Your complainant is advised * * * that the City of Jackson * * * has in its hands amounts in excess of the sum of $2500.00 belonging to your complainant and the said Bishopric and Shaffer, and being one half of the proceeds collected by said City * * * from said * * * gas wells, plus a 5% overriding interest therein."

Notwithstanding, in this very suit the City was demanding payment and the Power Company not controverting its demand in view of the fact that Petitioners were making no claim whatsoever adverse to the Power Company by seeking recovery from the City for gas "delivered at the gate of Mississippi Power & Light Company". Compare *Home Insurance Company* v. *Tate Mercantile Company*, 117 Miss. 760, 78 So. 709.

This matter constitutes exclusively a question of local pleading and practice and in no sense a federal question. 28 *U. S. Code Ann.*, Sec. 344, Notes 81-86 and 274; French v. *Hopkins*, 124 U. S. 524, 31 L. Ed. 536. There being no issue against the Power Company, it did not defend against the City's demand for gas delivered and judgment was entered in favor of the City thereasto and against the Power Company. "It is ordered, adjudged and decreed that the Mississippi Power & Light Company pay over to the City of Jackson the sum of $41,061.42 and that this will be a full and complete release and acquittance for all gas purchased * * * under this contract * * *." (R., 194.)

The case thus made was tried by Mr. Morse, for the City, and Mr. Cox, for Petitioners. As to the issue of whether or not the transaction between Petitioners and the City (whereto the Power Company was not a party) was ultra vires, and if ultra vires, the admeasurement of the equity that the City would be required to do.

Thereafter, the Chancellor, in the controversy between Petitioners and the City, held (a) that the contract as to acquisition and operation of these gas wells was ultra vires, and (b) that the City pay Petitioners $20,322.21, (R., 191), and in the controversy between the City and the Power Company, that "the amount paid by the Mississippi Power & Light Company and the price received by the City of

Jackson * * * is the fair market value of said gas and that said price shall be and is the basis of payments to be made to the respective interest holders * * *." (R., 193.) "It is further ordered, adjudged and decreed that the purchase by the Mississippi Power & Light Company of the gas is and was in all respects legal and a valid * * * (and) * * * the Mississippi Power & Light Company pay over to the City of Jackson the sum of $41,061.42, and that this will be a full and complete release and acquittance for all gas purchased from the city * * *. It is further ordered, adjudged and decreed that the bill is in all other particulars dismissed as to the Mississippi Power & Light Company * * *." (R., 194.) This decree to be entered in each of the causes (R. 195).

So that at no time in the trial court did the Petitioners, as against the Power Company, propound any demand whatever for relief, the Power Company was not in any way a party to the ultra vires controversy between the City and Petitioners, and the Power Company did not appeal, Petitioners having in the trial court interposed as against the Power Company no claim whatever for this gas.

The Constitution of the United States was not mentioned in the trial court. Petitioners concede (Petitioners' Br., 6): "No constitutional question was presented or argued in the trial court."

III. Statement of the Case.

Having adopted the statement of the case made by the City and supplemented it under "Preliminary Remarks", supra, no further statement is essential, except Petitioners' statement thereof is inaccurate in these particulars:

(a) Petitioners claim (Pet., p. 2) express authority for the City to act under Chapter 280, Mississippi Laws 1940. The Chancellor held this transaction ultra vires

in a finding of fact inadvertently omitted from the record, but see, R., 192. The Supreme Court on the first hearing unanimously held it ultra vires (R., 196) and on the Suggestion of Error, it was held ultra vires by Judge Anderson (R., 203, et seq.), by Judges Alexander and Roberds (R., 207): "We think this contract is ultra vires and invalid because it was not authorized by, nor embraced within, said Chapter 280." And by Judges McGehee and Griffith (R., 211): "Which may, in some respects, be ultra vires, * * *." The Chief Justice, apparently, agreed with Petitioners (R. 208), the Court thus dividing five to one.

(b) Petitioners claim that the City entered into a contract with the Power Company for the output of these wells "*at a nominal price without seeking the best market therefor.*" (R., 30) (Pet., 2-3). As hereinbefore quoted, the Chancellor found these contracts valid, conceded by Petitioners (Pet., 13), and under evidence from disinterested witnesses, L. P. Love (R., 182), Frank Tatum, (R., 183), that full value was obtained by the City for the output of these wells when, after a long delay, they were connected to the distribution system.

(c) Petitioners claim that the contracts were fully performed. With deference, the record does not so show.

(d) It is claimed that the question of the Constitutionality of Section 280 was improperly raised for the first time in the Supreme Court. But Constitutional questions appearing upon the face of the record may be raised at any time, even *sua sponte* by the Court. The State Supreme Court did withdraw its first opinion, but the predicate therefor was not that Chapter 280 was not a local law, but that when the Lieutenant-Governor and Speaker of the House signed the bill, they were assumed to have seen

to it that the bill had been referred to the Committee provided for in Section 89, and that if they violated this Section, the Court would presume that compliance had been had, notwithstanding they knew off the record it had not. The presumption of conformity by the Legislature was conclusive, under Mississippi decisions, on the court.

So that, while it is true that Chapter 280 was allowed to stand, it stood not on its merits, but only by reason of this presumption.

(e) It is claimed that Judge Anderson held "that Petitioners' contract was ultra vires and void because it violated Section 183, Mississippi Constitution of 1890, *with two Justices concurring.*" With deference, Judge Anderson held (R. 203) that "What took place between the parties under the statute violated Section 183 of the Constitution and * * * amounted to a surrender by the City of part at least of its governmental powers * * * both of these grounds are well founded." And then, in support of the ultra vires contention, relied upon *Ampt* v. *Cincinnati*, 56 Ohio St. 47, 46 N. E. 69, and other cases.

Judges Alexander and Roberds did not pass on whether or not Chapter 280 violated Section 183, nor did they construe Section 183 as applicable "to the situation here," but held solely the transaction ultra vires (R., 207). And in this holding, in part at least, Judges Griffith and McGehee concurred (R., 211).

(f) Three Judges of the Court did not dissent as to the ultra vires holding maintained by Judges Anderson, Alexander and Roberds. Judges McGehee and Griffith concurred in this ultra vires holding in part, and the Chief Justice disagreed, but that which divided Mississippi's court was not the question of ultra vires, vel non, but assuming the transaction to be ultra vires, what was the

City required to do for Petitioners in this ultra vires transaction. Three Judges held that doing equity required only the return of the actual consideration paid. The other three held that restitution, substantially as though the contract was being enforced, was requisite, but that whereon the Court divided was not in any sense a federal question, being one only of general law.

(g) Petitioners claim "* * * no factual justification or support in this record" (Pet., p. 4). But, with deference, the facts are admitted not to be substantially in dispute, and it is unquestioned that five of the Judges of the Court held the transaction ultra vires, with one Judge dissenting. This was strictly a local question, and apparently as to ultra vires, vel non, Petitioners do not seek to assign it as a federal question. Did they so do, however, their claim is baseless.

"This Court is bound by the decision of the highest Court of the State as to the powers of their municipalities. *Georgia R. & Power Co.* v. *Decatur*, 262 U. S. 432, 438 * * *." *Railroad Commission* v. *Los Angeles*, 280 U. S. 145, 152, 74 L. Ed. 234, 310.

IV. Questions Claimed by Petitioners to Be Presented.

In the Petition for Certiorari, opposite counsel make no mention of the Power Company when they advert to the alleged contravention of the Fourteenth Amendment, and properly so, as no federal question was asserted against the Power Company either in the Chancery Court or in the State Supreme Court. This failure to mention a federal question between the Power Company and the Petitioners was eminently proper because:

(a) No pleading by Petitioners against the Power Company in Cause No. 29,050;

(b) No possible federal question involved as between Petitioners and the Power Company, because

(1) The City being confessedly the owner of an undivided half interest in the gas, which was being produced from wells by it sunk, had, under State law, the right of disposition. "A cotenant of mineral lands or mines has a right to develop the same and remove the minerals, even without the consent or approval of the other cotenants." 36 *Am. Juris.*, "Mines & Minerals," Sec. 169, p. 398; *Prairie Oil & Gas Co.* v. *Allen*, 8 Cir., 2 F. 2d 566, 40 A. L. R. 1389; *Earp* v. *Mid-Continent Pet. Corp.*, 167 Okla. 86, 27 Pac. (2d) 855, 91 A. L. R. 188.

(2) Having sought an accounting against its cotenant, the City, for gas allegedly wrongfully disposed of by the City to Power Company, under a contract which was held valid and as vouchsafing full value, Petitioners are estopped to claim against the Power Company that whereasto they asked the City to afford rectification. Petitioners may not blow hot and cold. Equitable estoppel is never a federal question.

Petitioners made no monetary demand against the Power Company by any pleading, but knowing of the disposition to the Power Company by the City, and the price whereat this disposition was had, Petitioners demanded an accounting in equity against their alleged cotenant, the City, for the full value of that sold "without regard to the price at which the City sold said gas to * * * Power Company." Having thus sued, Petitioners cannot hereafter consistently demand any judgment against the Power Company for wrongfully purchasing the gas sold by the City to Power Company. This constituted an election of remedies.

Compare *Murphy* v. *Hutchinson*, 93 Miss. 643, 48 So. 178, 21 L. R. A. (NS) 785, 17 Ann. Cases, 611; *Edwards*

v. *Edwards* (Miss.), 11 So. 2d 450, 452; 6 *Miss. Digest*, Title "Election of Remedies," Key No. 3, p. 146.

In 28 *C. J. S.*, 1069, it is said:

> "Actions proceeding on the theory that title to property is in one party are inconsistent with those proceeding on the theory that title is in another party."

In 18 *Am. Jur.*, Sec. 12, p. 135, it is said:

> "It has been said that the so-called 'inconsistency of remedies' is not in reality an inconsistency between the remedies themselves, but must be taken to mean that a certain state of facts relied on as the basis of a certain remedy is inconsistent with, and repugnant to, another certain state of facts relied on as the basis of another remedy."

A question of estoppel is local, not federal.

V. Petitioners' Reasons for Granting Writ.

Hereunder, Petitioners devote themselves exclusively to the matter of the $18,637.13 and the $1,800.00 (R., 182) in controversy between the City and Petitioners and whereasto the Power Company has no place, and even conceding that, by imagination, there might be a Federal question therein, it did not affect the Power Company in any way.

VI. Petitioners' Statement of the Case.

We advert to the statement of the case as made by the City and, with deference, challenge as inaccurate, for the reasons therein and herein shown, the statements made in conflict with that herein and therein claimed.

VII. Petitioners' Assignment of Error and Argument.

1. Assignments 1 and 3 should be grouped together. They are:

> "(1) That Section 183, Mississippi Constitution 1890 was and is in nowise involved.

"(3) That the decision of the court is predicated on a supposed fact not to be found in this record to the effect that the municipality thereby lent its credit to petitioners in violation of Section 183 of the Constitution, and its decision is arbitrary and thereby deprives these petitioners of their property without due process and in violation of the equal protection clause of the Federal Constitution."

Whereto, the Power Company replies and submits that no jurisdiction attaches here because:

(a) For the reasons assigned by the City in its reply.

(b) The Power Company was not, directly or indirectly, a party to or interested in this aspect of the litigation, having been voluntarily eliminated therefrom by Petitioners' voluntary action in suing their alleged co-tenant, the City, for the gas delivered by the City to the Power Company.

(c) Judge Anderson alone made reference to Section 183 of the Constitution. Five Judges held specifically that this transaction was *ultra vires*, and thereby this being a local question, the decision of the Supreme Court, which did not advert to any Federal question, is conclusive here, and not subject to review under the statute.

2. Petitioners next assign:

"(2) The court erroneously cancelled said contracts in suit after full performance thereof and while the municipality then and now continues to enjoy the fruits thereof, without requiring it to do equity as a prerequisite thereto."

Our reply to this assignment is likewise no jurisdiction attaches because:

(a) For the reasons assigned by the City in its reply.

(b) This assignment deals exclusively with the contracts "cancelled" and with the failure of the State Courts in not requiring the City "to do equity as a prerequisite thereto". As shown, the Power Company was not a party to this aspect of the controversy. No relief therein or thereasto was in any way against Power Company prayed.

(c) If there were a Federal question raised whereto Power Company was a party it was raised too late, the State Supreme Court in no way adverting to any Constitutional question. 28 *U. S. Code Ann.*, Sec. 344, Note 221, p. 282.

(d) Mississippi's court deleted completely *Feemster* v. *City of Tupelo*, 83 So. 804, 121 Miss. 733, in good faith and completely from the basis upon which it affirmed the Chancellor's decision. It thus accorded to Petitioners full relief as to their claim under the *Feemster* case. They may not herein complain of an error made in their own favor for, with deference to the State Supreme Court, the right thus accorded Petitioners very possibly contravenes prior Mississippi decisions. Compare *Monette* v. *State*, 91 Miss. 662, 44 So. 989; *Pascagoula* v. *Krebs*, 151 Miss. 676, 118 So. 286; *Toombs* v. *Sharkey*, 140 Miss. 676, 106 So. 273.

(e) Having had a full hearing in the trial court and a full hearing in the Supreme Court, Petitioners under the Constitution are not entitled to any further hearing. The function of this Court never has been to grant a second appeal where the parties have had a full hearing.

The right to appeal in fact, itself, is statutory and not constitutional. 4 *C. J. S.*, Title "Appeal and Error", Sec. 1, 18, 2 *Am. Jur.*, Title "Appeal and Error", Sec. 5, 6.

WHEREFORE, it is respectfully prayed, that insofar as the controversy here between Petitioners and the Power Company, there be no writ of Certiorari. Petitioners have filed

no pleading against the Power Company. Petitioners have waived any possible Constitutional question when they interposed no demands against the Power Company but allowed the City to recover a judgment for all gas furnished, claiming in this suit no title thereto.

Respectfully,

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